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Selvaraju Mudaliar a/l Kalliparamal v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–4 OF 2006
SURIYADI, HASAN LAH AND AHMAD MAAROP JJCA
2 JUNE 2010

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Criminal Law — Penal Code — s 302 — Murder — Defence of unsoundness of mind — Accused suffering from schizophrenia — Accused under medication for schizophrenia — No evidence to indicate whether accused taken medication at time of murder — Whether possible for accused to have suffered a relapse at time of murder — Whether defence of unsoundness of mind established — Penal Code ss 83 & 302

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Criminal Procedure — Defence — Unsoundness of mind — How determined — Medical and expert opinion — Conduct and state of mind of accused before and after offence — Penal Code s 84

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The accused — a schizophrenic inmate of a drug rehabilitation centre — had been convicted and sentenced to death in the High Court for the murder of a fellow inmate ('the victim'). In the High Court, the prosecution had contended that on 12 March 2001 at 10.40am, the accused had attacked the victim with a 'cangkul' at a hostel in the rehabilitation centre. After attacking the victim, the accused had attempted to run away, but was apprehended by fellow inmates. SP5, a consultant psychiatrist, called by the prosecution testified that although the appellant was a schizophrenic patient, his mental condition was stable at the time of the killing. The accused knew what he was doing and was aware of the consequences of his actions. SP5 also testified that the accused had received psychiatric treatment not only prior to the incident but also after the incident. In his defence, the accused admitted to being angry with the victim as the victim had constantly teased him. The accused admitted that he had only wanted to hurt the victim and denied that he had any intention to kill the victim. The accused further testified that he could not remember whether he had taken his medication, and if so, the required dosage at the time he assaulted the victim. In convicting the accused, the High Court judge held, inter alia: that whatever mental illness the accused was suffering from had been treated and stabilised, even if he had failed to take his medicine or failed to take the required dosage as prescribed. There was no evidence to suggest that at the moment of striking the victim with the 'cangkul', the accused was incapable of

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knowing the errors of his act or that it was contrary to law. The accused appealed to the Court of Appeal.

Held, allowing the appeal:

(1) SP5's evidence was tainted. In the course of the trial it transpired that she had sight of the accused's cautioned statement prior to formulating her opinion of his mental capacity. To make matters worse, this highly relevant document was never tendered into court, evidence which could have helped the accused's cause (see para 15).

(2) The question whether the accused was suffering from unsoundness of mind at the time of the commission of his act, was determinable not only by medical evidence and expert opinion, but also by his conduct and the state of his mind before and after the crucial time. The legal insanity defence depends very much on the evidence (see para 24); *John a/k Nyumbei v Public Prosecutor* [2007] 7 MLJ 206 referred.

(3) The trial judge's positive conclusions went against the evidence of SP5. SP5 had clearly testified that she had prescribed anti-depressants and anti-psychotic medicine to the accused commencing 2 May 2003 at the Hospital Bahagia. If indeed the accused was cured of his medical problems, he would not have need of such prescriptions. Further SP5 had interviewed the accused two years after the incident, and not knowing whether he had taken the medicine supplied earlier by Hospital Banting, was unable to say with any certainty whether the accused was suffering from a relapse of his illness on 12 March 2001 at 10.40am. Since SP5 was the prosecution's witness it was bound by her evidence. With the prosecution being bound by SP5's testimony, and with such obvious hesitancy and uncertainty on her part, the positive assertion of the learned judge was without basis and a misdirection (see para 28); *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371 referred.

(4) Since the accused still needed the prescription, it followed that he was still not cured of his schizophrenia. As testified by SP5, unless the accused took his medication, he would suffer a relapse and the full blown effect of his schizophrenia. There was no evidence to positively establish that the accused indeed had complied with the medication and the dosage (see para 32).

(5) The substantive evidence indicated that the accused most probably did not take his medication. Thus, there was reasonable doubt whether the accused was in command of his mental faculties when he killed the victim. On a balance of probabilities, the appellant had established his defence of unsoundness of mind and thus was not capable of knowing that his act was wrong or contrary to law (see para 33); *Mat v Public Prosecutor* [1963] MLJ 263 referred.

[Bahasa Malaysia summary

Tertuduh — seorang penghuni di pusat pemulihan dadah yang mempunyai penyakit skizofrenia — telah disabitkan dan dihukum mati di Mahkamah Tinggi bagi kesalahan membunuh seorang penghuni lain ('mangsa'). Di Mahkamah Tinggi, pihak pendakwaan berhujah bahawa pada 12 Mac 2001 pada pukul 10.40 pagi, tertuduh telah menyerang mangsa dengan cangkul di hostel di pusat pemulihan tersebut. Selepas menyerang mangsa, tertuduh mencuba untuk melarikan diri tetapi telah ditahan oleh penghuni-penghuni lain. SP5, psikiatri konsultan, yang memberi keterangan bagi pihak pendakwaan menyatakan bahawa walaupun perayu adalah pesakit skizofrenia, keadaan mentalnya adalah stabil pada masa pembunuhan. Tertuduh mengetahui apa yang dilakukannya dan mengetahui akibat tindakannya. SP5 juga menyatakan bahawa tertuduh telah menerima rawatan psikiatri bukan sahaja sebelum kejadian tersebut malah selepas kejadian tersebut. Di dalam pembelaannya, tertuduh mengakui menjadi marah dengan mangsa kerana mangsa berterusan mengejeknya. Tertuduh mengakui bahawa dia hanya berniat mencederakan mangsa dan menafikan bahawa dia mempunyai niat untuk membunuh mangsa. Tertuduh selanjutnya menyatakan bahawa dia tidak ingat sama ada dia telah makan ubatnya, dan jika ya, dos yang diperlukan, pada masa dia menyerang mangsa. Dalam mensabitkan tertuduh, hakim Mahkamah Tinggi memutuskan, antara lain: bahawa sebarang penyakit mental yang dialami oleh tertuduh telah dirawat dan distabilkan, walaupun dia gagal untuk makan ubatnya atau gagal mengambil dos seperti yang disuruh. Tidak ada keterangan yang menyarankan bahawa pada masa menyerang mangsa dengan cangkul, tertuduh tidak boleh memahami kesilapan tindakannya atau bahawa ia bertentangan dengan undang-undang. Tertuduh merayu ke Mahkamah Rayuan.

Diputuskan, membenarkan rayuan:

(1) Keterangan SP5 adalah cacat. Semasa perbicaraan ia diketahui bahawa dia telah melihat kenyataan beramaran tertuduh sebelum memberikan pendapat mengenai kapasiti mentalnya. Untuk mengeruhkan lagi keadaan, dokumen yang amat relevan ini tidak pernah dikemukakan di mahkamah, iaitu keterangan yang mungkin boleh membantu kausa tertuduh (lihat perenggan 15).

(2) Persoalan sama ada tertuduh mengalami sakit jiwa pada masa melakukan tindakannya, bukan sahaja boleh diputuskan melalui keterangan perubatan dan pendapat pakar, malah oleh tindakannya dan keadaan mindanya sebelum dan selepas masa yang genting tersebut. Pembelaan ketidaksiuman dari segi undang-undang amat bergantung kepada keterangan (lihat perenggan 24); *John a/k Nyumbei v Public Prosecutor* [2007] 7 MLJ 206 dirujuk.

(3) Kesimpulan yang positif oleh hakim perbicaraan adalah bertentangan dengan keterangan SP5. SP5 telah memberikan keterangan yang jelas bahawa dia telah memberikan ubat anti-depresi dan anti-psikotik kepada tertuduh bermula dari 2 Mei 2003 di Hospital Bahagia. Jika benar tertuduh telah pulih daripada masalah perubatannya, dia tidak memerlukan preskripsi tersebut. Selanjutnya, SP5 telah menemu ramah tertuduh dua tahun selepas insiden tersebut, dan tanpa mengetahui sama ada dia telah mengambil ubat yang diberikan terlebih dahulu oleh Hospital Banting, tidak boleh menyatakan dengan pasti sama ada tertuduh mengalami semula kesakitannya pada 12 Mac 2001 pada pukul 10.40 pagi. Oleh kerana SP5 adalah saksi pihak pendakwaan dia terikat oleh keterangannya. Dengan pihak pendakwaan terikat dengan keterangan SP5, dan dengan keraguan yang begitu jelas dan ketidakpastian pada pihaknya, penegasan secara positif oleh hakim yang bijaksana adalah tanpa asas dan adalah salah arah (lihat perenggan 28); *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371 dirujuk.

(4) Oleh kerana tertuduh memerlukan preskripsi, oleh itu dia tidak pulih daripada skizofrenia. Seperti yang dinyatakan oleh SP5, jika tertuduh tidak makan ubatannya dia akan mengalami semula penyakitnya dan kesan keseluruhan skizofrenia. Tidak ada keterangan untuk menunjukkan secara positif bahawa tertuduh sememangnya telah mematuhi ubatannya dan dosnya (lihat perenggan 32).

(5) Keterangan substantif menunjukkan bahawa tertuduh berkemungkinan besar tidak mengambil ubatannya. Oleh itu, terdapat keraguan yang munasabah sama ada tertuduh mempunyai keupayaan untuk mengawal akal fikirannya apabila dia membunuh mangsa. Atas imbangan kemungkinan, perayu telah membuktikan pembelaan ketidaksiuman dan oleh itu tidak boleh mengetahui bahawa tindakannya adalah salah atau bertentangan dari segi undang-undang (lihat perenggan 33); *Mat v Public Prosecutor* [1963] MLJ 263 dirujuk.]

Notes

For a case on unsoundness of mind, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 1728.

For cases on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1520–1579.

Cases referred to

Baharom v PP [1960] MLJ 249, CA (refd)
Bhikari v State of Uttar Pradesh AIR 1966 SC 1 (refd)
Goh Yoke v PP [1970] 1 MLJ 63, FC (refd)
John a/k Nyumbei v PP [2007] 7 MLJ 206; [2007] 2 CLJ 509, CA (refd)

Juraimi bin Husin v PP [1998] 1 MLJ 537; [1998] 2 CLJ 383, CA (refd)
Krishnan v PP [1987] 1 MLJ 292, SC (refd)
M Ratnavale v S Lourdenadin [1988] 2 MLJ 371, SC (refd)
Mat v PP [1963] MLJ 263 (refd)
Pendakwa Raya v Zainal Abidin Mohd Zaid [1993] 1 CLJ 147, HC (refd)
Rajagopal v PP [1977] 1 MLJ 6, FC (refd)
Woolmington v The Director of Public Prosecutions [1935] AC 462, HL (refd)

Legislation referred to

Criminal Procedure Code s 112
Evidence Act 1950 ss 105 Illustration (a), 167
Penal Code ss 84, 300 Exception 1, 302

Appeal from: Criminal Case No 45–0 of 2001 (High Court, Shah Alam)

M Visvanathan (Saibullah MV Nathan & Co) for the appellant.
Saiful Edris bin Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Suriyadi JCA (delivering judgment of the court):

[1] The accused person, an inmate of a drug rehabilitation centre was charged for the murder of a fellow inmate, one Sivalingam a/l Subramaniam ('the deceased') under s 302 of the Penal Code. The charge reads as follows:

> Bahawa kamu, pada 12 Mac 2001, jam lebih kurang 10.40 pagi di Asrama Bakawali 3, Pusat Serenti Dengkil, Dengkil, di dalam Daerah Sepang, dalam Negeri Selangor Darul Ehsan telah melakukan bunuh dengan menyebabkan kematian terhadap Sivalingam a/l Subramaniam (K/P: A1117291), dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] At the end of the trial the learned judge found the accused person guilty of the offence, convicted him and passed the death sentence as provided for under the law. He, hereinafter referred to as the appellant, filed an appeal against the conviction and sentence imposed.

[3] The facts and the evidence are as follows.

[4] The appellant and the deceased occupied the same hostel, known as 'Asrama Bakawali 3' ('the hostel') at Pusat Serenti Dengkil. A prosecution's witness SP6 testified that at about 9.30am on 12 March 2001 while watching the television in the hostel he heard a knocking sound on a bed. He turned his head towards the sound and saw the deceased holding his bleeding leg though still standing, whilst the appellant was holding a *cangkul*.

[5] He then saw the appellant swinging the *cangkul* and striking the deceased's head. Thereupon the appellant left the hostel, and when asked by SP6 'apa pasal (why?)', he was told by the appellant 'tak payah tanya. Hantar dia ke hospital (Don't ask. Send him to the hospital)'. The appellant then made a run for it, after placing the *cangkul* beside a nearby drain, merely 40 feet away from the hostel. However, two other inmates, namely Mutalib and Daud, managed to prevent him from running away. These two persons, being HIV victims, did not give evidence as they had passed away by the time the trial was underway.

[6] SP3, an auxiliary police officer attached to the Pusat Serenti Dengkil testified that on that fateful day at about 10.40am, he found many inmates gathered at the hostel. Upon reaching the room, he found the deceased lying on his bed, with his leg and right side of his head covered with blood, but still alive. The deceased was then sent to the clinic but succumbed to the injuries.

[7] SP7, one Dr Nurliza bt Abdullah, the forensic pathologist who performed a post mortem on the deceased, confirmed that the examination revealed a deep incised wound on the head, which had sliced the underlying skull bone. That had caused internal injuries to the brain resulting in his demise. There were no other underlying causes which contributed to the death. The cause of death was put as severe head injuries sustained by the deceased from a heavy blow to the head. The DNA analysis conducted by SP4 confirmed that the DNA profile on the blood stains from the cangkul was consistent with the DNA profile of the blood specimen of the deceased.

[8] The prosecution when attempting to establish a prima facie case took a rather novel course of action when it called one Dr Rabaiah ('SP5'), the consultant forensic psychiatrist of Hospital Bahagia at Ulu Kinta, as one of its witnesses. We could only assume that the prosecution wanted to anticipate the appellant's defence of insanity and ensure the calling of his defence by calling this witness. In a gist it must have wanted to nib the appellant's case in the bud. In her testimony, SP5 testified that:

> Setelah lebih kurang 2 1/2 bulan beliau bersama kami di Hospital Bahagia, kesimpulan saya ialah: (1) *OKT ada mempunyai gejala-gejala penyakit mental yang dinamakan Skizofrenia*. Beliau juga sedang menerima rawatan untuk kemurungan; (2) Walau bagaimanapun, saya juga berpendapat bahawa di masa kejadian pada 12/3/2001, penyakit mental beliau di dalam keadaan stabil dan beliau sedar akan akibat daripada perbuatannya.

[9] The purpose of the above testimony by SP5 was without any doubt an attempt by the prosecution to establish the fact that at the time of the commission of the offence the appellant was sane and knew the consequences

of his act. In a word even though the appellant was a schizophrenic patient his mental condition was stable at the time of the killing.

[10] Under s 105 of the Evidence Act 1950, as provided for in Illustration (a), the burden of proving that by reason of unsoundness of mind he did not know the nature of the act rests on the accused person. Mahadev Shanker J in *Pendakwa Raya v Zainal Abidin Mohd Zaid* [1993] 1 CLJ 147 had occasion, in his obiter dicta, to suggest that in simple and straightforward non-jury trials, defence counsel should raise the defence of insanity immediately after the charge is read. Here the appellant did not have the opportunity to raise the defence of unsound mind as he was pre-empted by the evidence of the prosecution. Whether by inadvertence or miscalculation, SP5's testimony had made matters easy for the appellant, as even before the defence was called the court was informed of his affliction and of his probable defence. It took away any tactical submission that the issue of unsoundness of mind was an afterthought defence. Despite this inadvertent admission of the appellant's defence such a premature admission of evidence was not a ground for us to nullify the trial (s 167 of the Evidence Act 1950; *Krishnan v Public Prosecutor* [1987] 1 MLJ 292). This admission by the prosecution as regards his mental affliction would play a major role in our explanation on the eventual findings.

[11] Despite this affliction it was still held by the learned judge that the prosecution had made out a prima facie case against the appellant and had called upon him to enter his defence. By calling the defence, implying he was sane, the onus shifted to the appellant to disprove his sanity.

[12] At the defence stage, in order to rebut the presumption that he was of sound mind, the appellant took a rather simple and straightforward approach (*Bhikari v State of Uttar Pradesh* AIR 1966 SC 1). He called no witnesses to support his testimony. His version was that on 12 March 2001, he took a *cangkul* and hit the deceased, and thereafter left the hostel but remained outside. He failed to remember what he did when he was standing outside the hostel. He admitted knowing the deceased for two months prior to the incident, but alleged that the latter always teased, disturbed and hit him. Prior to the incident, he never quarrelled with the deceased. Under cross-examination, being angry at the behaviour of the deceased, he testified that he only wanted to hurt the deceased but certainly not to kill.

FINDINGS OF THE LEARNED JUDGE AT THE END OF THE DEFENCE STAGE

[13] As the learned judge was satisfied with the evidence adduced by the prosecution, and being satisfied that a prima facie case had been established, called upon him to enter his defence. In his grounds of judgment, apart from

discussing the evidence adduced by the appellant, the learned judge had also re-evaluated the earlier prosecution's evidence.

[14] The learned judge had concluded that there was no dispute that the deceased died as a result of severe head injury due to a heavy blow on the head, inflicted by the appellant with a *cangkul*. There was also no dispute that the appellant intended to inflict injury on the deceased. The learned judge then went on the exercise of resolving whether the defence of unsound mind had been established on a balance of probability now that the defence had been called. The onus being on the appellant to satisfy the court on a balance of probability, in order to succeed in a defence of unsound mind, in the sense required by s 84 of the Penal Code, that was needless to say a correct statement of law (*Pendakwa Raya v Zainal Abidin Mohd Zaid* [1993] 1 CLJ 147; *Rajagopal v Public Prosecutor* [1977] 1 MLJ 6; *Goh Yoke v Public Prosecutor* [1970] 1 MLJ 63).

[15] In the course of opining whether the appellant had successfully established the defence, the learned judge began by stating that the evidence of the consultant forensic psychiatrist from Hospital Bahagia Ulu Kinta ie SP5, was not challenged. Indisputably no rebuttal medical expert evidence was admitted by the appellant. Learned counsel for the appellant ventilated that poverty was the reason for his inability to obtain the aid of another expert to counter SP5's evidence. On the other hand, SP5's evidence was tainted as in the course of the hearing it transpired that she had sight of the appellant's cautioned statement prior to formulating an opinion of his mental capacity. We could only imagine the tilted effect the contents of the cautioned statement had on the mind of the doctor. To make matters worse this highly relevant document was never tendered into court, evidence which could equally have helped the appellant's cause. This witness obviously did not impress us as a model witness as she had also made some conflicting remarks in the course of the hearing as regards the mental capacity of the appellant. More of this later.

[16] The learned judge further held that there was no evidence adduced by the appellant indicating a relapse of his mental illness at any time prior to the incident, let alone on the day of the incident.

[17] He then took a bolder step by stating that whatever mental illness the appellant was suffering had been treated and stabilised, even had he failed to take his medicine or failed to take the required dosage as prescribed. There was also no evidence available to suggest that at the moment of striking the deceased with the *cangkul*, the appellant was incapable of knowing the errors of his act or that it was contrary to law.

[18] In the course of supporting his finding that the appellant had failed to establish the defence of unsound mind, the learned judge had also alluded to D25, a piece of evidence adduced by the appellant. This is a witness statement ('D25') recorded under s 112 of the Criminal Procedure Code, and tendered at the defence stage, and of which the learned judge commented:

> It is clear, upon consideration of the statement of Arishah bin Zakariah, as a whole, the accused was normal at all material times because he was adequately observed, treated and medicated for his mental illness.

[19] It was also obvious from our reading that the learned judge was highly influenced by the testimony of the appellant that he wanted retribution and wanted to injure the deceased. The factor of the appellant wanting to escape, and would have succeeded, had he not been prevented by the two inmates had indeed played in the mind of the learned judge.

[20] To justify further the conviction, perhaps for comprehensiveness, the learned judge also discussed the defence of provocation. He summarised that the last occasion the deceased disturbed the appellant was the afternoon of 11 March 2001, whilst the incident happened at about 10.40am on 12 March 2001. He held the view that, with there being a cooling-off period, such a disturbance could not amount to a grave and sudden provocation, capable of depriving the appellant of self control. He thus ruled that the defence of provocation alleged by the appellant was a fabrication and an after-thought and accordingly rejected it.

[21] With the appellant failing to establish that his conduct fell within the Exception 1 of s 300 of the Penal Code, and thus failing to cast any doubt on the prosecution's case, the prosecution thus had successfully established its case against the appellant on the basis of beyond reasonable doubt. He thenceforth found him guilty of the offence of murder and accordingly sentenced him to death.

THIS PANEL'S VIEWS

[22] Despite the clarity of the grounds of judgment, we had misgivings with the findings of the learned judge pertaining to his conclusions that the appellant was of sound mind, when striking the deceased. We held the view that the learned judge had misdirected himself as regards the evidence pertaining to this highly pertinent matter. Our reasons for the difference of view are manifold, and are as follows.

[23] We begin by stating the obvious that the appellant's defence was that he was of unsound mind on that relevant date as he could not remember taking his prescription. This prescribed defence is legislated at s 84 of the Penal Code and it reads:

> Act of a person of unsound mind
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> 84 Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

[24] To succeed, the appellant therefore has to establish that at the time of the commission of the act, by reason of unsoundness of mind, was incapable of knowing the nature of the act, or incapable of knowing what he was doing as wrong or contrary to law. The learned judge had correctly stated that the question whether the appellant was suffering from such an affliction at the time of the commission of the act was determinable not only by medical evidence and expert opinion, but also by his conduct and the state of his mind before and after the crucial time (*John a/k Nyumbei v Public Prosecutor* [2007] 7 MLJ 206; [2007] 2 CLJ 509). This legal insanity defence depends very much on the evidence.

[25] Even though it was incumbent upon the appellant to establish the defence of unsoundness of mind at the earliest stage, but as stated earlier, his work was cut out for him when the prosecution through SP5 divulged that he was a mental patient (*Juraimi bin Husin v Public Prosecutor* [1998] 1 MLJ 537; [1998] 2 CLJ 383; *Baharom v Public Prosecutor* [1960] MLJ 249). Apart from revealing his schizophrenia, SP5 divulged that the appellant had received psychiatric attention from several psychiatrists not only prior to the incident, but also after it. She evinced that the appellant received medication from Banting Hospital on 21 February 2001 not only for schizophrenia but also secondary depression.

[26] Pertaining to the mainstream defence the appellant had testified that at the material time when he assaulted the deceased he could not remember whether he had taken his prescription, or for that matter the required dosage. By implication due to that failure he had suffered a relapse. This statement is pertinent to the appellant's defence as SP5 in the course of the examination had occasion to say:

> If a person who is suffering from schizophrenia and is not taking medication it is possible that he may not be aware of the consequences of his action.

[27] The above statement was elicited at the prosecution's stage. Since it was the prosecution's stance that the appellant was of sound mind on 12 March 2001, though SP5 had categorically stated that if a patient failed to take his medication he would suffer a relapse and hence be unaware of his actions, it then became incumbent on the prosecution to establish that the appellant had indeed taken his medication. This, the prosecution failed to do.

[28] As aforesaid the learned judge had held that there was no evidence of the appellant having a relapse prior to the incident, let alone, on the date of the incident. He even concluded that the appellant had been treated, and his failure to take his medicine on some occasion, or had failed to take the required dosage as prescribed, was of no consequence. These were positive conclusions which went against the evidence of SP5. The latter in crystal clear terms had testified that she had prescribed anti-depressants and anti-psychotics medicine to the appellant commencing 2 May 2003 at Hospital Bahagia. Surely if he was cured of his medical problems he would not have need of such prescriptions? This witness, who had interviewed the appellant two years after the incident, and not knowing whether he had taken the medicine supplied by Hospital Banting, was unable to say with any certainty whether the accused was suffering from a relapse of his illness on 12 March 2001 at 10.40am. Since SP5 was the prosecution's witness it must be bound by her evidence (*M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371). With the prosecution being bound by this consultant's testimony, and with such obvious hesitancy and uncertainty on her part, the positive assertion of the learned judge therefore was without basis and a misdirection.

[29] With the inadvertent self-debilitating evidence adduced by the prosecution, the appellant thus should have been acquitted without his defence being called and forthwith set free. Obviously this was the unexpected counter productive effect on the prosecution's case, for being overly innovative in the hope of nipping the appellant's defence in the bud. Had it not been for his consistent plea of being mentally unsound when committing the act, which tantamount to a plea of guilt, but deserving a detention at Hospital Bahagia, he could have walked away a free man.

[30] On the unlikely premise that the learned judge did not err when concluding a prima facie case was successfully established, the onus then had shifted to the appellant to rebut the prosecution's case. If he failed to establish that he did not take his medicine on that fateful day, on a balance of probability premise he thus would be left defenceless (*Woolmington v The Director of Public Prosecutions* [1935] AC 462).

[31] From the aspect of the defence, what then was the other additional evidence that could have saved him ie apart from the earlier mentioned evidence of SP5? Beginning with his testimony at RR 81 and 82, where he testified of not remembering taking his medicine, there was the evidence of SP6 and the documentary evidence of D25. SP6, a prosecution's witness, in no uncertain terms had testified that he was scared of the appellant as he knew the latter was insane ('tidak siuman'). Next we have D25, a statement taken from one Arishah bin Zakaria, a medical assistant at the Serenti Rehabilitation Centre at Dengkil, who confirmed that there were times when the appellant did not come to take his medicine and at times did not comply with the prescribed dosage (Adakalanya dia tidak datang untuk ambil ubatnya dan adakala dia tidak ikut dosage yang diberikan kepadanya).

CONCLUSION

[32] Without the need of much legal deliberation or judicial activism, it was obvious to us that, as the appellant still needed the prescription, it logically followed that he was still not cured of his schizophrenia. As testified by SP5, unless he took his prescription, he would suffer a relapse and thus suffer the full blown effect of his schizophrenic sufferings. Evidentially we found no evidence to positively establish that he indeed had complied with the prescription and the dosage.

[33] Without there being any evidence adduced to establish that he took the prescription and the prescribed dosage on 12 March 2001, vis-a-vis the substantive evidence available to indicate that he most probably did not take the medicine whether by inference or otherwise, we were therefore in reasonable doubt as to whether he was in command of his mental faculties when he killed the deceased person (by analogy, see *Mat v Public Prosecutor* [1963] MLJ 263). On that premise we were therefore satisfied on a balance of probability that the appellant had established his defence of unsoundness of mind and thus not capable of knowing that his act was wrong or contrary to law. Our consequential orders that ensued were as follows:

(a) this court finds that at the time at which he was alleged to have committed the offence, he was by reason of unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law, as per the charge. We find that he did commit the act of killing the deceased person; and

A (b) we therefore order him to be kept in safe custody at Hospital Bahagia and this order be reported to the Ruler of the State.

Accused acquitted.

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Reported by Andrew Christopher Simon

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